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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ----------

71-404

LEWIS COLTEN,
Appellant,

—v.—

COMMONWEALTH OF KENTUCKY,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS TO THE COMMONWEALTH OF KENTUCKY

JURISDICTIONAL STATEMENT

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LEWIS COLTEN,

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—v.—

COMMONWEALTH OF KENTUCKY,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS TO THE COMMONWEALTH OF KENTUCKY

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of the Commonwealth of Kentucky, issued on May 21, 1971, the order and mandate on which was entered on June 22, 1971, affirming in full the judgment of conviction against the Appellant, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the Kentucky Court of Appeals is reported in 467 S.W.2d 374. Copies of that opinion, the order and mandate of the Kentucky Court of Appeals, and the Notice of Appeal filed herein are attached in the Appendix at pp. 1a-11a, 18a. The opinion of the trial court is contained in the closing pages of the trial transcript and is also attached in the Appendix at pp. 12a-16a.

Jurisdiction

This action was initiated in the Quarterly Court of Fayette County, Kentucky where on March 6, 1970 Appellant was convicted by the court of violating KRS 437.016, the Kentucky Disorderly Conduct Statute. That statute is set forth in the Appendix at p. 19a. Appellant appealed his conviction to the Criminal Division of the Fayette Circuit Court where, pursuant to the Kentucky Rules of Criminal Procedure (hereinafter "Rcr"), Rule 12.02, he received a trial *de novo*. Rule 12.02 is also set forth in the Appendix at p. 20a. By consent, that trial was without jury, and on April 27, 1970 Appellant was convicted of violating KRS 437.016 subsection (f) and a penalty adjudged; that penalty being five times greater than that imposed at the first trial. Upon appeal to the Court of Appeals of the Commonwealth of Kentucky the judgment of conviction was affirmed, the court rejecting, among other contentions of unconstitutionality, appellant's challenge to the validity of KRS 437.016 on the grounds that on its face and as applied to Appellant it is repugnant to the Constitution of the United States. That decision issued on May 21, 1971 and the final order and mandate was entered on June 22, 1971. Notice of Appeal was filed in the Kentucky Court of Appeals on June 30, 1971. The jurisdiction of the Supreme Court to review this decision is conferred by 28 U.S.C. §1257(2). Jurisdiction is supported by *Pope* v. *Atlantic Coast Line R.R.*, 345 U.S. 379, 381-82; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547; *Largent* v. *Texas*, 318 U.S. 418, 421-22.

Questions Presented

1. Has the Kentucky Disorderly Conduct Statute, KRS 437.016, been rendered overly-broad and unduly vague, in violation of freedom of expression and assembly and of due process of law, by the Court of Appeals' holding that the statute applies to non-obscene, non-defamatory assembly and expression causing mere inconvenience or annoyance to police officers if, in the opinion of the Kentucky courts, that assembly and expression falls below the level of minimum social value?

2. Has the Kentucky Disorderly Conduct Statute been rendered overly-broad and unduly vague, in violation of freedom of expression and assembly, and of due process of law, by application of the statute to convict a person on the grounds that (a) he failed to leave when ordered by the police to do so at the scene of the issuance of a motor vehicle citation to another person where the person charged with disorderly conduct either stated that he wished to observe what was happening or stated that he wished to aid affected persons to secure transportation home; or (b) on the grounds that his presence caused others to congregate in a roadway?

3. Where, under the state rules of criminal procedure, the appeal of a case on law, as well as fact, from a lower criminal court can be had only by trial *de novo* in the court of general jurisdiction, and where upon conviction in such an appeal by trial *de novo*, and without setting forth any special grounds of justification, the court of general jurisdiction fixes the penalty five times greater than that set by the lower criminal court, has the right to

appeal been unconstitutionally chilled and fettered and has the defendant been unconstitutionally twice placed in jeopardy, all in violation of the due process clause of the Fourteenth Amendment.

Statutes and Procedural Rules Involved

KRS §437.016 is found in 1968 Cumulative Supplement to the Kentucky Revised Statutes at p. 1272; and Rules 12.02 and 12.06 of the Kentucky Rules of Criminal Procedure are found in 1968 Cumulative Supplement to the Kentucky Revised Statutes at pp. 1430-31. These provisions are set forth in the Appendix at pp. 19a-20a.

Statement of the Case

A. The Events.

On March 3, 1970, Mrs. Richard Nixon was in Lexington, Kentucky on a widely publicized tour. The record shows that Appellant, Lewis Colten, and others went to the Bluegrass Airport, which serves Lexington, to demonstrate in support of a "peoples" gubernatorial candidate and at the same time overtly to ignore Mrs. Nixon's presence.

Mr. Colten is a young person with a long moustache and long hair who dresses in a manner which the Fayette County Circuit Court described as "differently than what the great majority of society would believe in" (Tr. pp. 202-03, App. at p. 12a). While in the terminal area, at about the time Mrs. Nixon's plane was preparing to take off, Mr. Colten was observed by the arresting officer, Trooper Harlowe. Trooper Harlowe's testimony of this first encounter with Colten was as follows: "[A]s the airplane was getting

ready to leave they [included Colten] came up to me where I was stationed at, at the airport, and said, 'We're going to have a party.' I said, 'Not out here,' so they then proceeded to get over on the lawn of the airport and throw themselves a little whooping and hollering party over there or whatever they call it, creating a scene." Trooper Harlowe's testimony made it clear that he was offended by Colten's style of dress and presence at the airport "with an awfully lot of important people travelling in and out." Although he declined to make a specific finding either way, the Fayette County Circuit Court noted that: "It may be that the police officers were hostile toward this defendant because of his appearance" (Tr. p. 204, App. at p. 13a). No arrest was made at this time.

After Mrs. Nixon's plane departed, those at the airport terminal left via the access road. Colten was driving a car with two passengers and had room for three or four more. He was directly behind a vehicle operated by Guy Mendez. The Mendez car carried a total of five persons.

At the direction of State Police Officer John R. Miller, the Mendez car pulled over onto the shoulder of the outbound traffic lane, off of the access road. Officer Miller pulled off of the road directly behind the Mendez car, and on seeing this, Colten, who knew Mendez, pulled off of the road and behind Officer Miller's vehicle. Officer Miller found that Mendez had an expired out-of-state license plate and had pulled Mendez over for the purpose of issuing a citation. Officer Miller informed the occupants of Mendez's car that it would have to be towed away.

The Appellant approached Officer Miller and Mr. Mendez to inquire what was happening. There is disputed testimony as to whom he addressed his inquiry, whether to Mendez or to Officer Miller.

The prosecutor attempted to establish that Colten had stood in the road and caused an obstruction to traffic in violation of Subsection (e) of KRS 437.016. However, the evidence against Colten on this was at best unclear and generally showed that there was little traffic and that any blockage was caused by the later arriving police vehicles which parked in the road even though they could have pulled onto the grass on the other side of the access road. Moreover, the trial court rejected that theory as the basis for finding Colten guilty. Nevertheless, the Kentucky Court of Appeals found that Colten was guilty because his presence *caused others* to stay and block a traffic lane. 467 S.W.2d at 376.

Additional State Police and County Police officers arrived, their number being variously estimated at 5 to 10. Additional non-police cars pulled onto the shoulder and the number of people in the vicinity of Mendez's car was variously estimated at 4 to 18 with most of the testimony, including Officer Miller's, making it clear that they were standing in several different groups in various places.

Captain Mayes of the State Police told the people standing around to get into their cars and leave. He testified that he did not specifically see Mr. Colten at this time or specifically ask him to leave. State Police Officer T. H. Brown testified that when he arrived he twice said to Mr. Colten: "Now, this is none of your affair, what's going on here, get back in your car and please move on and clear the road."

Officer Harlowe, the arresting officer, testified that he first saw Colten at the edge of the road, that he asked Colten to

leave, and that when asked to leave, Colten said that he was going to stay around and see what happened. Colten denied making this response. Almost all of the evidence described Colten as speaking quietly to Officer Harlowe. Yet, as the defense witnesses testified, Officer Harlowe said to Colten: "O.K. loudmouth, get back in the car," or words to that effect. Colten's response was to the effect that he would, but that he first wanted to help the people needing rides. On cross examination, Officer Harlowe admitted that he may have addressed Colten as "loudmouth" and that he may have said to him "You've caused enough trouble today." Officer Harlowe, referring to his previously noted personal impressions concerning Colten's appearance, stated that he felt that Colten had "caused enough trouble." Officer Harlowe also admitted that Colten "might have" asked whether he could give a ride to some of the people in the Mendez vehicle. And in his decision the trial judge noted, "I appreciate the fact that he [Colten] may have been waiting to help. . . ." (Tr. p. 206, App. at p. 25a).

Although there is clear evidence that Officer Harlowe took Colten into physical custody, there is also evidence that he never told Colten that he was under arrest and that, in fact, after grabbing Colten he again asked Colten whether he would leave. The evidence is clear that from the time Harlowe ordered Colten to leave through the time he took Colten into physical custody, Colten was constantly well off the road standing on a grassy shoulder area. Upon grabbing Colten, Trooper Harlowe was joined by other police officers and the evidence showed that Mr. Colten was then punched, his hair and moustache pulled by these other police officers, and that he was tossed into a police van. One police officer testified that he heard what was

possibly a scream of pain from Colten. And, the trial court in its decision stated: "I think that the police officers may have also been a little rougher in this instance than may have been necessary. I don't know, I don't find that they did or did not" (Tr. p. 204, App. at p. 13a).

B. The Proceedings.

On March 6th, 1970, Colten was tried without jury in Fayette County Quarterly Court and convicted under KRS 437.016. He was fined $10 plus costs. The closing argument of the defense asserted that the application of the statute to this case was prohibited by the due process and equal protection clauses of the Constitution of the United States. There is no record of these proceedings.

Colten appealed his conviction pursuant to RCr 12.02 and prior to the resulting trial *de novo* in Fayette Circuit Court, Criminal Division, appellant again raised his challenges to KRS 437.016 by a pre-trial motion to dismiss on the grounds that KRS 437.016 is unconstitutionally vague and void for over-breadth under the 14th Amendment. The court denied this motion at the opening of trial (Tr. p. 2, App. at p. 16a).

By consent, the trial *de novo* was without a jury. The Circuit Court found Appellant guilty under subsection (f) of KRS 437.016 (refusing to comply with a lawful order of the police to disperse) and fined him $50 and costs. Appellant's challenges to the constitutionality of KRS 437.016 on its face under the Fourteenth Amendment were renewed on a motion for a directed verdict at the close of the prosecutor's case. They were again renewed in closing

argument and once more upon a motion for a new trial. In addition, appellant challenged, at these times, the application of the statute to the facts of the case on the grounds that such application would violate the Equal Protection clause of the Fourteenth Amendment and would give KRS 437.016 an interpretation which would do violence to the due process clause of the Fourteenth Amendment. Further, after judgment was rendered, appellant duly moved the trial court to correct the penalty imposed so as not to exceed that imposed by the court below. This motion was based on the due process clause of the Fourteenth Amendment. The Circuit Court rejected all of appellant's constitutional objections.

Appellant appealed to the Court of Appeals of Kentucky, asserting as his first assignment of error that "KRS 437.016 is unconstitutionally vague and is so broad as to encompass constitutionally protected activity with the result that the statute is void and cannot be used to convict Lewis Colten."

Further, Appellant argued that KRS 437.016 could not be constitutionally construed to cover the conduct involved in this case. Rejecting these arguments, the Kentucky Court of Appeals ruled that:

> As reasonably construed, the statute does not prohibit the lawful exercise of any constitutional right. We think that the plain meaning of the statute, in requiring that the proscribed conduct be done "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," is that the specified intent must be the *predominant* intent. Predominance can be determined either (1) from the

> fact that no bona fide intent to exercise a constitutional right appears to have existed or (2) from the fact that the interest to be advanced by the particular exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise. [Emphasis in original.] 467 S.W.2d at 377.

Appellant also contended in the Kentucky Court of Appeals that "The Circuit Court was restricted by RCr 12.06 and due process to imposing a penalty no greater than that imposed by the Quarterly Court." The Kentucky Court of Appeals held that the rationale of *North Carolina* v. *Pearce,* 395 U.S. 711, does not apply to a trial *de novo* appeal. Hence upon a *de novo* appeal the appellant is subject to the maximum penalty under law irrespective of the penalty imposed below.

The Questions Are Substantial

A. The Subjective Balancing Concept of Variable Freedom of Expression and Assembly Used by the Kentucky Court of Appeals in Construing and Applying the Disorderly Conduct Statute Has Substantial Impact on Every Freedom of Assembly and Expression Case in Kentucky and Is Contrary to Established Constitutional Doctrine.

In *Edwards* v. *South Carolina,* 372 U.S. 229, this Court held that freedom of expression is protected against both prior restraint and subsequent punishment "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." 372 U.S. at 237.

In announcing its decision in the case at bar, the Kentucky Court of Appeals enunciated and relied on a quite different doctrinal approach to ascertaining constitutional validity. It ruled that under the disorderly conduct statute, which it found constitutional, conduct is proscribed if either (a) "no bona fide intent to exercise a constitutional right appears to have existed" on the part of the defendant, or (b) if the interest advanced by the defendant "is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise" of his constitutional rights. 467 S.W.2d at 377. In explanation, the Kentucky Court said:

> "[W]e do not believe that the evil must be one that rises far above inconvenience, annoyance or alarm where the particular exercise of the right of speech falls far below the level of minimum social value. We think it is a matter of balancing of interests and that where the interest which the individual seeks to advance through exercise of freedom of speech is minuscule in comparison with the public's interest in being protected from the consequences of that exercise, the public's interest should previal even though the harm the public might be exposed to is no more than inconvenience or annoyance" (467 S.W.2d at 377).

The Kentucky court also stated that if "lack of redeeming social value is a basis upon which the right of freedom of speech may be required to yield to the protection of contemporary standards of morality . . . , it would seem that the public's interest in being protected from inconvenience, annoyance or alarm should prevail over any claimed right to utter speech that has no social value" (467 S.W.2d at 377).

This highly subjective constitutional balancing doctrine of variable protection announced by the Kentucky Court of Appeals extends beyond the confines of the facts of the instant case and beyond the reach of the Disorderly Conduct statute. It places a cloud over all freedom of expression and assembly in Kentucky. For example, the doctrine of this case would apply to such other Kentucky criminal statutes as KRS 435.300 (Spreading Slanderous Report); KRS 436.107 (Use of Obscene Language on Telephone); KRS 436.150 (Profane Cursing or Swearing); 436.520 (Vagrancy); 436.530 (Peace Officer's Duty to Disperse Vagrants); 437.014 (Failure to Disperse); 437.015 (Unlawful Assembly); 437.017 (Loitering); and 437.015 (Inciting Race Prejudice), rendering all of these statutes, and possibly others, constitutionally void for overbreadth. But until such declaration of infirmity is authoritatively made in this case, the doctrine of this case as applied to all of these statutes will burden the exercise of basic constitutional freedom.

The rule of the Kentucky Court in the instant case is contrary to established constitutional policy. On the face of its own opinion, the Kentucky Court of Appeals has reshaped this Court's holding in *Edwards* v. *South Carolina*. Moreover, its decision illustrates the very sort of dangers from subjective, variable approaches to basic liberties which this Court has tried to foreclose. For example, this Court in *Coates* v. *Cincinnati*, 29 L. ed.2d 214, warned that a state cannot constitutionally restrict expression or assembly "through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." The Kentucky

Court of Appeals, applying its version of the constitutional standard, however, found a violation of law in this case based on its imputation of intent on the part of appellant to "irritate the police by his presence, and by efforts at interruption." In other words, while this Court looks to the substantiality and immediacy of overt dangers resulting from the exercise of constitutional rights (*Brandenburg v. Ohio*, 395 U.S. 444; *Cohen* v. *California*, 29 L. ed.2d 214), the Kentucky Court's constitutional test is responsive to the policeman's emotional reaction to the defendant and to the Kentucky high court's own manifest antipathy toward him.[1]

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[1] Although the record shows that Colten spoke quietly at all times, Officer Harlowe admitted that he might have addressed Appellant as "loudmouth." There was considerable testimony that the policeman did use this term and in appellant's brief to the Kentucky Court of Appeals, counsel called attention to this fact in support of the contention that Colten was arrested in violation of Equal Protection because of his appearance and not because of his conduct. Responding to this argument, the Court's opinion states: "Colten complains of the fact that the arresting officer called him a 'loudmouth' when making the arrest, but we think this complaint comes with little grace from a man who argues in his brief the right of a citizen to call policemen *and their wives* 'pigs.' The evidence warrants the conclusion that Colten was in fact a 'loudmouth,' which fact tends to show an *absence* of discrimination in the enforcement of the statute against him, because 'loudmouths' are the class of persons who ordinarily would commit violations of the statute." [Emphasis in original.] (467 S.W.2d at 379.) (The reference to calling policemen "pigs" originated in appellant's brief to the Kentucky Court where appellant's counsel, to illustrate the statute's overbreadth, employed a hypothetical involving a fictitious person who uses this term in giving a speech to a gathering of policemen and their wives.)

B. The Impact of This Decision Is Substantial and Far Ranging Because It Involves the Constitutional Construction and Application of a Statute Which Is Frequently Resorted to as a Catch-All in Dealing With By-Standers and "Undesirables."

It is well recognized that a broadly construed disorderly conduct statute readily becomes a tool for police abuse of constitutional rights. As noted by the President's Commission on Law Enforcement and Administration of Justice, such statutes can be used to justify almost any exercise of law enforcement authority.[2] Yet the Kentucky Court of Appeals has by the instant decision given its approval to application of the disorderly conduct statute to someone who fails to disperse when ordered by the police to leave the area in which a citation is issued unless the defendant can satisfy the court that he had "some bona fide purpose other than merely to assemble" (467 S.W.2d at 378). The approach of the Kentucky Court on this aspect of the case is contrary to that of the New York court in *People* v. *Stein,* 278 N.Y.S.2d 832 (1967), and in conflict with the Supreme Court's reasoning in *Thompson v. Louisville, supra* at 206; *Coates* v. *Cincinnati, supra; Wright* v. *Georgia,* 373 U.S. 284, 291-292 (1963); *Shuttlesworth* v. *Birmingham,* 382 U.S. 87; *Shuttlesworth*

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[2] "Minor crime statutes are frequently misused. They are employed as a means of clearing undesirables or unsightly persons from the street or driving them out of town, aiding the police in detaining a suspected person during an investigation of a more serious crime, and regulating street activity in slum neighborhoods." President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Police at p. 187 (1967).

"Most statutes which are used to regulate street conduct are so broad that almost unlimited discretion is given to the police officer to arrest persons on the street or, as with a failure-to-move-on statute, to regulate conduct by the threat of arrest." *Id.* at 188.

v. *Birmingham,* 394 U.S. 147. (See also the comments to the Proposed Model Penal Code Art. 250 at pp. 14-17 of Tent. Draft No. 13 (1961).)

In Kentucky, 13.4 percent of all non-traffic arrests in 1970 were for disorderly conduct. Only arrests for drunkenness surpassed disorderly conduct arrests in number. When offenses involving excessive use of alcohol are eliminated, disorderly conduct accounted for 27.5 percent of all non-traffic arrests in Kentucky during 1970.[3]

The impact of the Kentucky high court's constitutional interpretation of the Kentucky disorderly conduct statute, therefore, by giving wide discretion to police authorities and by placing upon the defendant a burden of demonstrating the urgency of his exercise of constitutional rights, has shaped the statute into a likely tool for police abuse.

The facts of the instant case serve as a good example of how KRS 437.016 facilitates such encroachments upon constitutional freedom.

The manifest truth is that the appellant was not arrested for disorderly conduct. Disorderly conduct entered the picture later, as a *post hoc* justification for the arrest. He was arrested because some policemen after a long tense day protecting the First Lady, were unable to resist the temptation first to order about this hippie-demonstrator type, then to grab him, and finally to rough him up. Having lost their professional composure, the police attempted to mask their error with a charge. The disorderly conduct statute, being such a broad and sweeping provision, was a logical choice. By rejecting appellant's constitu-

[3] Commonwealth of Kentucky, Uniform Crime Reports: 1970 at p. 30, Table 7 (1971).

tional challenges to such application of the statute, the Kentucky high court has fallen into the error described by this Court in *Coates* v. *Cincinnati, supra,* of creating "an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle or their physical appearance is resented by a majority of their fellow citizens." 29 L. Ed.2d at 218. That error poses a most substantial threat to the constitutional liberties of persons living in, or passing through, Kentucky. It should be reviewed by this Court.

C. This Appeal Is Substantial Because the Challenged Statute Bears Great Similarity to the Disorderly Conduct Statute in the Proposed Model Penal Code, the Proposed New Federal Criminal Code and the New York Act.

The substantiality of the constitutional issues raised by the Kentucky high court's application of the Disorderly Conduct statute in this case is heightened by the fact that the language of the Kentucky statute is very similar to New York's Disorderly Conduct Statute (N.Y. Penal Law §240.20) and to the Disorderly Conduct provisions of the Proposed Model Penal Code (Article 250) and the Proposed New Federal Criminal Code (§1861). Although the Kentucky court's decision conflicts with the New York decisions on the application of the Disorderly Conduct statute,[4] and flies in the face of commentaries accompanying both the proposed Model act and the proposed new federal revisions,[5] there is danger that the Kentucky deci-

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[4] See *People* v. *Stein,* 278 N.Y.S.2d 832 (1967).

[5] Proposed Model Penal Code, Tent. Draft No. 13, Comments, at pp. 14-17 (1961); Nat'l Comm'n on Reform of Fed. Crim. Laws, Final Report at p. 270 (1971).

sion will have persuasive impact upon future adjudication under the disorderly conduct statutes of other states, especially those based on the proposed Model and federal acts.

D. There Is a Conflict Among the Courts Respecting the Application of *North Carolina* v. *Pearce* to Trial *De Novo* Appeals From Lower Criminal Courts and This Case Presents the Same Basic Question as *Rice* v. *North Carolina* in Which Certiorari Has Been Granted.

The Court of Appeals for the Fourth Circuit, the United States District Court for the Eastern District of North Carolina, the Supreme Courts of Arizona, Indiana, and Hawaii, and the Maryland Court of Special Appeals have all held that the reasoning of *North Carolina* v. *Pearce*, 395 U.S. 711, applies to trial *de novo* appeals from lower criminal court convictions.[6] On the other hand, the Court of Appeals for the First Circuit, and the Michigan, North Carolina and Virginia Supreme Courts,[7] as well as the Kentucky Court of Appeals, have rejected this interpretation of *Pearce*. It is not surprising, therefore, that the Court recently granted certiorari on this issue in *Rice* v. *North Carolina*, No. 70-77. And, inasmuch as the *Rice* case involves an appellate decision to the effect that

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[6] *Wood* v. *Ross*, 434 F.2d 297 (4th Cir. 1970), cert. granted sub nom. *Rice* v. *North Carolina*, 39 USLW 3437 (Apr. 5, 1971); *Torrence* v. *Henry*, 304 F. Supp. 725 (E.D. N.C. 1969); *McDougald* v. *Ivester*, 321 F. Supp. 943 (E.D. N.C. 1971); *Bronstein* v. *Superior Court*, 475 P.2d 235 (1970); *Eldridge* v. *Indiana*, 267 N.E.2d 48 (Ind. Sup. Ct. 1971); *Hawaii* v. *Shak*, 466 P.2d 420 (1970); *Cherry* v. *State*, 264 A.2d 887 (Md. Ct. of Spec. App. 1970).

[7] *Lemieux* v. *Robbins*, 414 F.2d 353 (1st Cir. 1969), cert. denied 397 U.S. 1017 (1970); *State* v. *Spencer*, 173 S.E.2d 765; *State* v. *Sparrow*, 173 S.E.2d 897 (N.C. 1970); *Michigan* v. *Olarz*, 170 N.W. 2d 842 (1969); *Evans* v. *Richmond*, 171 S.E.2d 247 (Va. 1969).

Pearce is applicable to trial *de novo* appeals, and the instant case involves an appellate decision rejecting that view, the instant case presents an appropriate companion to *Rice* on the application of *Pearce*.

E. Because the Kentucky Court of Appeals Has Acknowledged That Its Lower Criminal Courts Do Not Afford Full Constitutional Protections, the Chilling of the Right to Appeal From Those Courts Creates an Especially Serious Deprivation of Constitutional Rights.

In the course of its opinion in the instant case, the Kentucky Court of Appeals stated: "Under our system of justice the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms." Thus, as a result of the decision in the instant case, a defendant in a police or quarterly court is faced with accepting a penalty imposed by that court in a proceeding which does not afford due process, or as the price of securing due process, placing himself in jeopardy of suffering an even greater penalty.

In the instant case the defendant was able to appeal from substantive constitutional errors (involving the validity of the disorderly conduct statute on its face and as applied) only by placing himself in jeopardy of an even greater penalty. And a fivefold increase in that penalty in fact resulted. The extent of that price for appeal from substantive constitutional error was more dramatically illustrated in *Bell* v. *Commonwealth*, —— S.W.2d —— (Ky. 1971), pet. for cert. filed June 1, 1971, where the defendant appealed to the Fayette Circuit Court from a one dollar fine for peacefully submitting to arrest in protest against a curfew. There the defendant was sentenced to almost six months' imprisonment and a $500 fine in the second trial.

As a result of the Fayette Circuit's imposition of increased penalties in trial *de novo* appeals from the lower criminal courts, defendants have in fact been deterred from pursuing their right to full constitutional protection. For example, App. pp. 21a-22a contains the opinion of the Fayette Circuit Court dismissing the appeal from the Quarterly Court's imposition of a $50 fine in a disorderly conduct case. As the court's opinion reveals, that motion was made by the appellant-defendant on the basis that strong antipathy toward college students posed the danger of a more severe penalty resulting from exercising the right of appeal. Acknowledging that danger, and the right to withdraw from an appeal, the Fayette Court granted the motion. Although there is no record to substantiate this fact, as counsel of record in that case, one of the undersigned attorneys (Alvin L. Goldman) can assure the Court that that appeal had been initiated because of meritorious claims of inadequate opportunity to prepare the defense, *and* of other errors of statutory and constitutional law. Thus, for fear of the possible substantial increase in penalty, the defendant there suffered the imposition of a criminal penalty in a proceeding in which he was not afforded his full constitutional protections.

Though the defendant was only fined in the instant case, in the next case he might suffer 6 months' imprisonment from the lower trial court rather than chance an unsuccessful appellate challenge based on constitutional error because to chance it could result in 12 months' imprisonment.[8] The constitutional deficiency of such a possibility is, indeed, most real and substantial.

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[8] KRS 25.010 gives Quarterly Courts jurisdiction in misdemeanor cases involving penalties of up to $500 fine and up to twelve months' imprisonment. KRS 26.010 gives Police Courts the same scope of criminal jurisdiction.

CONCLUSION

For the foregoing reasons, jurisdiction should be noted.

Respectfully submitted,

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September 20, 1971

APPENDIX

Opinion of the Kentucky Court of Appeals

[467 S.W.2d 374]

LEWIS COLTEN,

Appellant,

—v.—

COMMONWEALTH OF KENTUCKY,

Appellee.

Court of Appeals of Kentucky.

May 21, 1971.

CULLEN, Commissioner.

Lewis Colten was convicted in the Fayette Quarterly Court of a violation of the Kentucky disorderly conduct statute, KRS 437.016, and was fined $10. He appealed to the Fayette Circuit Court where he was tried de novo (without a jury, it having been waived) and again was found guilty, but the fine was increased to $50. Colten appeals to this court from the circuit court judgment.

The circuit court found Colten guilty of violating paragraph (f) of KRS 437.016 (1). That paragraph, with an introductory phrase designed to be read with it, is as follows:

> "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> * * * * *

"(f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse * * * *"

Colten's two leading contentions are (1) that the statute is unconstitutional and (2) that even if the statute be held constitutional the Commonwealth failed to prove the elements of the offense proscribed by the statute. We shall give consideration first to the question of the sufficiency of the proof, because to do so enables the opinion to be commenced with a full statement of the facts and because we think that the question of constitutionality should be considered in the light of the facts of this case, not in the abstract. In measuring the sufficiency of the proof we shall of course view the evidence most favorably to the Commonwealth, and in stating the facts we shall state only the Commonwealth's version where there was probative evidence to support that version. Pearson v. Commonwealth, 295 Ky. 616, 175 S.W.2d 33; United States v. Smith, 6 Cir., 399 F.2d 896.

On March 3, 1970, Mrs. Richard M. Nixon (the First Lady) was in Lexington, Kentucky, to make a public appearance. When the appearance was concluded she was driven to the local airport to make her departure from Lexington. A substantial crowd was in attendance at the airport. Among those present were Colten and some 15 to 20 other college students who had attended in a group for the purpose of conducting a demonstration to protest against the program which Mrs. Nixon had advocated and to show support for the group's gubernatorial candidate. Colten was a leader and spokesman for the group.

As Mrs. Nixon's plane was preparing to depart the group engaged in some form of demonstration on the lawn of

the airport, which one of the Commonwealth's witnesses described as "a whooping and hollering party." The police who were present in strength by reason of the importance of the visitor and the crowd her presence had gathered, did not disturb the demonstration.

After Mrs. Nixon's plane had departed, the crowd at the airport began to leave. Colten's group got into their automobiles and formed a procession of some six to ten cars proceeding along the access road toward the main highway. A state police officer, John Miller, had observed that one of the first cars in the procession carried an expired Louisiana license plate, and he directed the driver, one Mendez, to pull his car off the road onto the right shoulder. When Mendez complied, Colten and the other members of the procession also pulled their cars off the road onto the shoulder. They all got out of their cars and Colten pursued inquiries as to the cause of the stopping of the Mendez car, while the others in the group, some 15 in number, stood around *in the roadway*.

Colten approached Officer Miller and asked why he had stopped the Mendez car. Miller told him that the car bore expired license plates, that he was not arresting Mendez but was giving him a citation, and that the car would be towed in to the city. Colten continued to endeavor to engage Miller in conversation, and to offer advice to Mendez, until Miller got into his patrol car with Mendez and rolled up the windows to shut out Colten's interference. Colten continued to remain in the area of the patrol car. His testimony was that he wanted to counsel Mendez as to a possible ground for relief from the citation and he wanted to arrange for passage to Lexington for Mendez and the latter's passengers. The evidence warranted the inference,

however, that Colten's real intent was simply to aggravate, harass, annoy and inconvenience the police, for no purpose other than the pleasure of aggravation, harassment, annoyance and inconvenience. He had been told by Officer Miller the cause of the stopping of the Mendez car, that Mendez was not being arrested, but that the car would be towed in. The fact that the license plate was expired was obvious. There was no occasion for further discussion or advice. Arrangements could have been made promptly for passage for the passengers in the Mendez car, who were under no detention. A simple word to Mendez that someone would wait down the road for him would have taken care of passage for Mendez. Instead, Colten, a leader of a group who had no interest at all in remaining at the scene, by his continued presence encouraged and led the others to stay, blocking a traffic lane and causing inconvenience and annoyance to other travelers. The presence of the Colten group caused other police officers to stop. A state police captain asked the group four or five times to leave. Another officer twice asked Colten to leave. A third officer, Harlowe, three times asked Colten to leave. Each time Colten offered some excuse. Finally, after the third request was not complied with, Officer Harlowe arrested Colten for disorderly conduct.

Arguing the insufficiency of the evidence to establish a violation of the statute, counsel for Colten says first that there was no proof of a lawful order to disperse; no proof of any need or purpose for an order to disperse. In making this argument counsel treats the situation as if Colten were a lone individual causing no trouble, not blocking traffic, merely trying to be of help to his friends in the Mendez car. The evidence, however, presents an entirely different picture of the situation, with Colten as the leader of a group

of some 15 persons who created inconvenience and annoyance by standing in the roadway, parking their cars so as to require police to stop their patrol cars on the roadway, forming an assembly for [redacted] purpose other than to aggravate, annoy, harass and inconvenience. Perhaps the inconvenience and annoyance were not great, but their extent was substantial when measured against the complete absence of any legitimate objective for the assembly.

Counsel next says that there was no proof of a refusal to disperse. We think the evidence, outlined above, fully warranted the inference that Colten's statements that he would leave *after* he had made arrangements for passage for the people in the Mendez car were simply disguised *refusals* to leave.

Counsel further says that there was no proof of an intent to cause public inconvenience or annoyance. As hereinbefore noted, we are of the opinion that the intent was clearly inferable from Colten's actions in continuing to remain at the scene, with his group, after any legitimate excuse for so doing had ceased to exist. The group was in fact causing inconvenience and annoyance, and it is reasonable to infer that this was the sole intent.

We come now to the question of constitutionality of the statute. In our approach to that question we shall be concerned primarily with the statute as applied to the facts of this case, not as it might be applied in some imaginary or hypothetical situation. See O'Leary v. Commonwealth, Ky., 441 S.W.2d 150.

Appellant asserts that the statute is unconstitutional because of (1) overbreadth and (2) vagueness. Overbreadth is claimed to exist in that the statute employs means that stifle or chill the exercise of constitutionally protected free-

doms when the end could be more narrowly achieved. See Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444; Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. Vagueness is asserted in that the statute is drawn in language so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. See Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322. It is our opinion, however, that the statute, *reasonably construed*, is not faulty in either of the claimed respects. Cf. O'Leary v. Commonwealth, Ky., 441 S.W.2d 150.

As reasonably construed, the statute does not prohibit the lawful exercise of any constitutional right. We think that the plain meaning of the statute, in requiring that the proscribed conduct be done "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," is that the specified intent must be the *predominant* intent. Predominance can be determined either (1) from the fact that no bona fide intent to exercise a constitutional right appears to have existed or (2) from the fact that the interest to be advanced by the particular exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise. The Supreme Court, in Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697, recognized that the right of freedom of speech may be required to yield where its exercise is likely to produce a clear and present danger of a serious substantive evil, and although the Court classified such an evil as one "that rises far above public inconvenience, annoyance, or unrest" we do not believe that the evil must be one that rises far above inconvenience, an-

noyance or alarm where the particular exercise of the right of speech falls far below the level of minimum social value. We think it is a matter of balancing of interests and that where the interest which the individual seeks to advance through exercise of freedom of speech is minuscule in comparison with the public's interest in being protected from the consequences of that exercise, the public's interest should prevail even though the harm the public might be exposed to is no more than inconvenience or annoyance. For example, if a person were to arise in the audience at a symphony concert and proceed in a loud voice to state at length his belief that Leghorn chickens are prettier than Plymouth Rocks, or some similar inanity, reasonable minds surely would agree that the interest of the public against being so annoyed would far outweigh any possible interest of the speaker to be served by that particular exercise of the function of speech.

If the lack of redeeming social value is a basis upon which the right of freedom of speech may be required to yield to the protection of contemporary standards of morality (see A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1), it would seem that the public's interest in being protected from inconvenience, annoyance or alarm should prevail over any claimed right to utter speech that has no social value.

We see no reason to engage in the making of fine distinctions between "speech" and "nonspeech" elements as was done in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672. Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697, recognizes that pure speech may be suppressed in the public interest if the danger to the

public is great enough. And it is axiomatic that private rights must yield to a reasonable exercise of the police power. 16 Am.Jur.2d, Constitutional Law, secs. 286, 287, pp. 556 to 560; Bowling v. City of Somerset, Ky., 333 S.W.2d 769.

In the language of Rowan v. United States Post Office, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736, we think it is a matter of "Weighing the highly important right to communicate * * * against the very basic right to be free from sights, sounds, and tangible matter we do not want * * * ." The government's "important or substantial governmental interest," required by *O'Brien* to exist as a basis for regulation in the area of First Amendment freedoms, is relative to the importance or substantiality of the particular purported exercise of one of those freedoms.

We subscribe fully to these expressions in Cox v. Louisiana, 379 U.S. 536 at 554, 85 S.Ct. 453, at 464, 13 L.Ed.2d 471:

> " * * * The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil rights which, in other circumstances, would be entitled to protection. * * * ".

In the instant case the evidence warranted the conclusion that Colten was not undertaking to exercise any constitutionally protected freedom. He was not exercising the right of freedom of speech because that right is concerned with expression of thought or dissemination of idea. See Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L. ed.2d 205. Colten was not seeking to express a thought to any listener or to disseminate any idea. He simply was trying to irritate the police by his presence and by efforts at interruption. Nor was he exercising the right of peaceable assembly, because that right, we believe, contemplates that the assembly is for some bona fide purpose other than merely to assemble, and Colten's group appears to have had no purpose other than to cause inconvenience and annoyance. So the statute as applied here did not chill or stifle the exercise of any constitutional right.

As concerns the argument of vagueness, we think our holding in O'Leary v. Commonwealth, Ky., 441 S.W.2d 150, is fully applicable. We believe that citizens who desire to obey the statute will have no difficulty in understanding it, relying, as they are entitled to, that the statute will be construed sensibly and reasonably. It is true that the statute does not attain idealistic perfection in preciseness, but it is fully as precise as some of the language of the Bill of Rights. We do conceive that the defining of prohibited conduct must be more precise than the defining of a right of conduct. To illustrate: If "peaceably" is a sufficiently precise word in the First Amendment's guarantee of the right of assembly, should "nonpeaceably" be considered too vague in a statute describing the kind of assembly that is prohibited?

It is our conclusion that the statute is not void for overbreadth or vagueness. In this view we are supported by the

decision of the three-judge federal district court in Muskat v. Goff, Civ. No. 6532, March 26, 1970 (W.D.Ky.).

The appellant makes a third contention, that the evidence shows the discrimination in the enforcement of the disorderly conduct statute, in that Colten was arrested solely because he wore a beard, long hair and "hippie" clothes, and because he and his group had demonstrated on the airport lawn. In our opinion the evidence does not require that conclusion. In view of the fact that Colten and his group were permitted to make their demonstration without interference, and in view of the fact that the police quietly and courteously asked Colten ten times to leave, before arresting him, we think a finding of discrimination in making the arrest hardly would be warranted, much less required. Colten complains of the fact that the arresting officer called him a "loudmouth" when making the arrest, but we think this complaint comes with little grace from a man who argues in his brief the right of a citizen to call policemen *and their wives* "pigs." The evidence warrants the conclusion that Colten was in fact a "loudmouth," which fact tends to show an *absence* of discrimination in the enforcement of the statute against him, because "loudmouths" are the class of persons who ordinarily would commit violations of the statute.

The appellant's final contention is that the imposition by the circuit court, on appeal from the quarterly court, of a fine higher than that imposed by the quarterly court, constituted a violation of due process, under the rationale of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2089, 23 L.Ed.2d 656. For the reasons stated by this court in Brooks v. Commonwealth, Ky., 447 S.W.2d 614, and for additional reasons hereinafter stated, we think the contention is not

valid. *Pearce* stands for the proposition that a defendant's right, by appeal, to obtain relief from *errors* upon a trial, cannot be impaired or fettered by the fear of receiving a greater penalty on a new trial, by way of retaliation for his having taken the appeal. Under our system of justice the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses. The convenience is for the benefit of the accused as well as of the Commonwealth. An accused who wants a full-blown trial, in a court of general jurisdiction designed to give full protection to his rights, may appeal to the circuit court and obtain a trial de novo. If he so desires, he need not undergo the bother of a trial in the inferior court, for he can plead guilty there and still appeal to the circuit court. Brown v. Hoblitzell, Ky., 307 S.W.2d 739. The question of whether there was *error* in the quarterly court is irrelevant. The "appeal" to the circuit court from the quarterly court is not an appeal in the sense of *Pearce*. It simply is an election to have the case determined by a court of general jurisdiction rather than by a court of convenience. We do not believe that *Pearce* intends to say that a state cannot put some price on the accused's privilege of a choice of courts as distinguished from pricing the right to obtain a fair trial in one court which the state fixes as the sole forum.

The judgment is affirmed.

All concur.

Fayette Circuit Court's Decision

The Court: It's at moments such as this that I can appreciate the responsibility that persons serving on the jury have. You hear excellent arguments by counsel on both sides, you've had an opportunity to see and observe the witnesses and listen to their testimony, and then you have to make your decision, and I appreciate the fact that it's not always a clear cut type of a case and gives you some concern.

In a case such as this, with a young defendant, young witnesses with him from the university, a young defendant dressing differently than what the great majority of society would believe in, maybe belonging to organizations that a lot of people would frown upon, engaging in activities that the majority of the people would not condone or believe in, the Court finds itself in the position of attempting to lean over backwards to let these young people know that they are entitled to a fair hearing, that they are to be judged in this case not on the basis of their appearance, not on the basis of the demonstration that may have taken there close to the airplane, not on the basis of organizations that they belong to, but upon the basis of the facts surrounding this particular case.

Yet in leaning over backwards to let these young people know that the courts do try to be fair, we have the other concern in that policemen in making arrests are sometimes interfered with in making that arrest, that on occasion they have been interfered with to the extent that recently in California two or three policemen lost their lives when they attempted to effect an arrest.

I'm not saying that in this instance there was any clear immediate danger to the police officers, but nonetheless I

can appreciate their concern when people start gathering around at the time they are making an arrest and I appreciate the fact that they may have been somewhat apprehensive on this day in question. I am sure that they heard many things and maybe a lot of this was strictly rumor with no basis in fact, but nonetheless, I am sure they were somewhat concerned.

I'm not going to again rule upon the constitutionality of the statute. I think we heard ample arguments on both sides, so it comes down to the question and the single question, was there disorderly conduct by the defendant on this occasion.

We heard from the police officers that a group ranging from five up through 15 people were gathered around at the time Officer Miller was attempting to issue a citation, that several cars had parked on the shoulder of the highway. You heard Trooper Miller testify that he left Mendez' automobile and went back to his car and rolled up the windows in order not to be interfered with by this particular defendant. You heard the other officers testify that on two or three occasions they asked this defendant to leave.

It may be that the police officers were hostile toward this defendant because of his appearance, he may have been physically offensive but I don't think that's a violation of the law, but I think that the police officers may have also been a little rougher in this instance than may have been necessary. I don't know, I don't find that they did or did not. I've heard the testimony, but I think the most crucial part of the testimony in this case is that Officer Harlowe, in making the arrest—this is from the defendant's own witnesses, even after he had him by the arm, again asked him if he was going to leave, and it seems inconceivable

to me that he would have again asked him if he was going to leave if he had no desire that he do so.

Miss Geis' testimony that there were up to maybe 15 people gathered around and the officers asked them to leave, and the fact that the police officers did park there and block the road, while it may not have been any of the automobiles belonging to the people associated with the defendant, nonetheless, it was their actions which would have brought on the blockage of this road.

I think on the basis of the testimony, and trying to weigh it completely, and listen carefully to all of it, that the Court will have to find that the defendant is guilty of the offense of disorderly conduct in his failure to leave the premises. I think the police do have a right to get a crowd back away from them at the time they are effecting an arrest. I'm not inclined to believe that the reason they want this crowd away is the fact that they want to commit brutality. The Court is aware that on occasion there is brutality by the police, but I think this is the exception rather than the rule. I don't believe this is the reason. I believe it is for the protection of the officers and the protection of the person they are attempting to arrest.

I think the evidence, as I say, is sufficient to find the defendant guilty of the disorderly conduct statute, which says that "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating the risk thereof," he obstructs vehicular or pedestrian traffic, or "congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse."

I think that the last one is the category in which the Court will find he is guilty of the offense of disorderly conduct. If he had wanted to help these people, they could

have remained in their cars, and after the officer had finished issuing the citation the people could have gotten out and come back and gotten into these other cars.

I appreciate the fact that he may have been wanting to help, but by the same token when the police ask him to leave and he had no lawful purpose for remaining, he should have returned to his automobile.

I find him guilty of this offense, and fix his fine at $50.00.

Fayette Circuit Court Ruling on Pre-trial Motions

The Court: Mr. Goldman, as I indicated to you the other day, I was inclined to rule against your motion to dismiss on constitutional grounds for the reasons stated the other day but advised you I would withhold my decision until such time as the three judge panel opinion from Louisville was submitted to me. That wasn't overly enlightening in that they stated no reasons that I could find for their decision, they just simply overruled it, said it was not unconstitutional.

I assume you were not able to get hold of a copy of the opinion that we were discussing either out of Baltimore or New York?

Mr. Goldman: It has not yet arrived, Your Honor.

The Court: All right. As I indicated to you, I am rather hesitant, unless it's shown on its face that the statute is unconstitutional, I am hesitant about declaring it unconstitutional. As indicated to you the other day, not only that, but I am also of the opinion that in abolishing the breach of peace statute and in enacting the statute, the legislature was attempting to more specifically define and describe those instances which would constitute disorderly conduct. I don't know that you can go much further in defining disorderly conduct. It may be possible that the Court of Appeals of Kentucky will find that it is unconstitutional, but I think I prefer to let them do so, so let your motion to dismiss on the basis of the constitutionality be overruled.

Notice of Appeal to the Supreme Court of the United States

COURT OF APPEALS
COMMONWEALTH OF KENTUCKY

File No. F-167-70

LEWIS COLTEN,

Appellant,

v.

COMMONWEALTH OF KENTUCKY,

Appellee.

NOTICE IS HEREBY GIVEN that Lewis Colten, the above-named appellant, hereby appeals to the Supreme Court of the United States from the final judgment, order and mandate of the Court of Appeals of Kentucky, entered on June 22, 1971, affirming the judgment of conviction issued herein on May 21, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

ALVIN L. GOLDMAN
Counsel for Appellant
1692 Williamsburg Road
Lexington, Kentucky 40504
257-2825

Mandate of the Kentucky Court of Appeals

COURT OF APPEALS
COMMONWEALTH OF KENTUCKY

SPRING TERM—May 21, 1971

LEWIS COLTEN

vs.

COMMONWEALTH OF KENTUCKY

Appeal from a judgment of the Fayette Circuit Court.

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

DICK VERMILLION, C. C. A.
By JOHN C. SCOTT, D.C.

Issued June 22, 1971

Kentucky Disorderly Conduct Statute

437.016 *"Disorderly conduct" defined; penalty.*

(1) A person is quilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) Engages in fighting or in violent, tumultuous or threatening behavior; or

(b) Makes unreasonable noise; or

(c) In a public place uses abusive or obscene language, or makes an obscene gesture; or

(d) Without lawful authority, disturbs any lawful assembly or meeting of persons; or

(e) Obstructs vehicular or pedestrian traffic; or

(f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

(g) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.

(2) Disorderly conduct is punishable by imprisonment in jail for not more than six months, by a fine of not more than $500, or both.

Kentucky Rules of Criminal Procedure

12.02 *Manner of taking.*

(1) An appeal to the circuit court is taken by filing with the clerk thereof a certified copy of the judgment and the amount of costs, and causing to be executed before the clerk a bond to the effect that the defendant will pay the costs of the appeal and perform the judgment which may be rendered against him on the appeal; whereupon, the clerk shall issue an order to the judge or the justice rendering the judgment, to stay proceedings thereon, and to transmit to the office of said clerk all the original papers in the prosecution.

(2) The applicable provisions governing bail shall apply to the bond provided for in subsection (1).

(3) After the service of the order to stay proceedings, no execution shall be issued from the inferior court, and any officer on whom the order is served shall return the execution in his hands as suspended by appeal.

12.06 *Schedule and manner of trial; judgment.*

Appeals taken to the circuit court shall be docketed by the clerk thereof as a regular criminal prosecution and shall be tried anew, as if no judgment had been rendered, and the judgment shall be considered as affirmed to the extent of the punishment, if any, adjudged against the defendant in the circuit court, and thereupon he shall be adjudged to pay the costs of the appeal. If an appeal taken to the circuit court be dismissed, the judgment of the court from which it was taken shall stand affirmed and the costs of the appeal shall be paid by the party whose appeal is dismissed.

Order of the Kentucky Court of Appeals

FAYETTE CIRCUIT COURT

SECOND DIVISION

Oct. 15, 1970

COMMONWEALTH OF KENTUCKY,

Plaintiff,

—v.—

STEVE BRIGHT,

Defendant.

(Appeal)

The defendant was found guilty in the Fayette Quarterly Court on a charge of disorderly conduct and fined $50.00 and costs. He thereafter filed an appeal with this Court. He has now filed a motion requesting that his appeal be dismissed. It would appear from the memorandum which was submitted in support of his motion to dismiss that the defendant is alleging that "* * * strong antipathy toward college students exist in this community. * * * this state of mind appears to be statewide—perhaps even nationwide." Further he makes reference to another case which was recently tried in this Court growing out of the same incidences which occurred at the University of Kentucky in May of this year and in which case the defendant received a substantially increased sentence than that imposed in the lower court.

The Commonwealth Attorney has advised the Court that he does not wish to oppose the defendant's motion to dismiss.

While the defendant may be correct in his assumption that the citizens of this community have a hostile attitude toward students who would attempt to disrupt the university, it may be that this hostility has been earned, and it is conceivable that a jury composed of citizens of this community might impose a more severe sentence than that imposed in the court below. Nonetheless, the Court after having reviewed the law submitted by the defendant and having conducted its own research of the law is of the opinion that the defendant has a right to dismiss his appeal and that he cannot be forced into a new trial if he does not desire to continue his appeal. For that reason the defendant's motion to have his appeal dismissed be and the same is hereby granted.

This October 14, 1970.

/s/ N. Mitchell Meade
Judge

A Copy

Attest: .....
Fayette Circuit Court

Copies to:

Commonwealth Attorney

Alvin L. Goldman
1692 Williamsburg Road
Lexington, Kentucky
Attorney for Defendant